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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1134

FRANCIS J. DUGAN
Petitioner,

v.

FRED KORTH, ET AL.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PAGE

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	11

Cases Cited:

American Power Co. v. S.E.C., 329 U.S. 90, 107-108	6
Anniston Mfg. Co. v. Davis, 301 U.S. 337	6
Anti-Fascist Committee v. McGrath, 341 U.S. 123	6
Borak v. Biddle, 141 F.2d 278 (C.A.D.C.), cert. denied, 323 U.S. 738	5
Burchell v. Marsh, 17 How. 344, 349, 15 L.Ed. 96	6
Dismuke v. United States, 297 U.S. 167, 172	7
Kihlberg v. United States, 970 U.S. 398, 24 L.Ed. 1106	6
Manning v. Stevens, 208 F.2d 827 (C.A.D.C.)	5
Money v. Anderson, 208 F.2d 34 (C.A.D.C.)	5
Mulligan v. Andrews, 211 F.2d 28 (C.A.D.C.)	5
Pa. R. Co. v. Labor Board, 261 U.S. 72	7
Ripley v. United States, 223 U.S. 695, 701, 32 S.Ct. 352, 56 L.Ed. 614	6
Switchmen's Union v. National Mediation Board, 320 U.S. 297	7
Tubun v. United States, 270 U.S. 568, 576, 577	7
United States v. Gleason, 175 U.S. 588, 602, 20 S.Ct. 22, 8, 44 L.Ed. 284	6
United States v. Wickersham, 201 U.S. 390	5
Wong Yan Sung v. McGrath, 339 U.S. 33, 49	6

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 14, 1964 (R. 330).

OPINIONS BELOW

There were no opinions by the court below.

JURISDICTION

Petitioner seeks to review judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 14, 1964 (R. 330). Motion for rehearing was denied on December 21, 1965 (R. 337). The jurisdiction of this Court is invoked under 28 U.S.C., ¶ 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner can be reduced in rank without the Secretary of the Navy following the procedures established by statute for that purpose?

2. Whether petitioner's right of appeal authorized by the Veterans' Preference Act can be nullified by the Civil Service Commissioners adopting a policy to not act upon said appeal unless the Navy Department first issued a standard personnel action form; and the Navy Department adopting a policy to not issue such form unless the Civil Service Commission so ordered. Here the Civil Service Commission did not order the issuance of such standard personnel action form by the Navy Department, with the result that petitioner's right of appeal was thereby abolished.

3. Whether the conduct of respondents in arbitrarily refusing to consider petitioner's appeal deprived petitioner of the rights guaranteed to him by statute?

4. Did respondents act arbitrarily and contrary to law in ruling that petitioner was not reduced in rank.

STATUTE INVOLVED

Section 14 of the Veterans' Preference Act of 1944 (Title 5, U.S.C. ¶ 863 provides:

> "No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall

be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right of appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date or receipt of notice of such adverse decision * * *."

STATEMENT OF THE CASE

Petitioner is a permanent civil service employee of the Boston Naval Shipyard entitled to veterans' preference (J.A. 178) authorized by Section 14 of the Veterans Preference Act of 1944 (Title 5, U.S.C. ¶ 863). He served as Master Shipfitter prior to shop grouping reorganization in the Boston Naval Shipyard, and was in charge of all personnel and work performed in the Structural Group (J.A. 46-48) and Shop 26 (J.A. 47-48). At the same time one F. J. Simon who is not entitled to veterans' preference was in charge of Shop 17 which was administratively grouped with Shops 11 and 26, and Mr. Simon was selected as Group Master. On February 1, 1961 (J.A. 320-321) petitioner was advised by the Boston Shipyard Commander as follows:

"By my letter to you of 30 November 1960 you were advised of the grouping of Shops 11/26 and 17 and that you were to continue to direct the affairs of your shop as heretofore, pending my approval of an organization plan for the shop group.

The organizational plan for your shop group has been submitted and generally approved. Accordingly, as of this date Mr. Simon has been given full authority to implement the plan as approved, and has been assigned full responsibility for over-all policy, administration and operation of all shops included in his group.

As head of Shops 11/26, you will report directly to and will be accountable to Mr. Simon for all matters affecting the organization facilities, and administration of the Shipfitting and Welding Shops, and for such other additional duties as he may assign in connection with the over-all shop grouping plan. In

my considered opinion shop grouping offers many opportunities for improving our operations and enhancing the effectiveness of the support which we furnish the Fleet. I am sure that I can count on you to continue to give the plan and Mr. Simon your wholehearted and unfailing support and cooperation."

Petitioner appealed (J.A. 177-178) the above adverse personnel action on February 6, 1961 to the Director, U.S. Civil Service Regional Office, upon the ground that the above-quoted letter constituted a reduction in rank as it had the effect of lowering his level of supervision. Whereas he formerly reported directly to the Production Officer, he now reports to F. J. Simon in his capacity as Group Master, who in turn reports to the Production Officer.

Respondents refused to consider the above-quoted letter as a "personnel action" on which petitioner based his appeal to the Civil Service Commission; and respondents arbitrarily refused to take jurisdiction of such appeal upon the ground that it was not "within the purview of Section 14 of the Veterans Preference Act". Thus petitioner was deprived of his right of appeal by this adverse action of respondents.

The motion of petitioner for summary judgment was denied by the District Court and that judgment was affirmed by the Court below (J.A. 330). Petitioner's petition for rehearing was denied December 21, 1965 (J.A. 337).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia has decided a question of general importance and substance relating to the construction or application of a statute of the United States which should be settled by this Court.

I

Reduction in Rank Contrary to Law

Petitioner was reduced in rank by the Secretary of the Navy, although there was no compliance with the following requirements of Section 14 of the Veterans' Preference Act:

(a) No reasons were given in writing for this action by Respondent No. 1.

(b) Petitioner was not given thirty days' advance notice in writing by Respondent No. 1 for this proposed action.

(c) Petitioner did not receive from Respondent No. 1, the Secretary of the Navy, a statement of any and all reasons, specifically and in detail, for reducing him in rank.

The courts have intervened to enforce compliance with specific procedural steps required by law and regulations *U.S. v. Wickersham*, 201 U.S. 390; *Mulligan v. Andrews*, 211 F.2d 28 (C.A.D.C.); *Manning v. Stevens*, 208 F.2d 827 (C.A.D.C.); *Money v. Anderson*, 208 F.2d 34 (C.A.D.C.); *Borak v. Biddle*, 141 F.2d 278 (C.A.D.C.), certiorari denied, 323 U.S. 738.

Respondents arbitrarily refused to consider petitioner's appeal. Petitioner's right of appeal as authorized by Section 14 of the Veterans' Preference Act was nullified by the Respondents Civil Service Commissioners adopting the policy here that the Civil Service Commission would not act unless and until the Navy Department issued a standard personnel action form and the Navy Department adopting a policy here to not issue such form unless and until the Civil Service Commission so ordered. As a result petitioner's right of appeal as authorized by the Veterans' Preference Act was nullified by the above-mentioned combined arbitrary and capricious action of all respondents, and constituted procedural error.

When the administrative decision is arbitrary or capricious or so gravely erroneous as to imply bad faith it will be set aside. *Burchell v. Marsch*, 17 How. 344, 349, 15 L. Ed. 96; *Kihlberg v. United States*, 970 U.S. 398, 24 L. Ed. 1106; *United States v. Gleason*, 175 U.S. 588, 602, 20 S.Ct. 22, 8, 44 L.Ed. 284; *Ripley v. United States*, 223 U.S. 695, 701, 32 S.Ct. 352, 56 L. Ed. 614.

Respondents aver that there was no reduction in rank. Their decision however, was not rendered after a hearing where evidence was introduced bearing upon the matter. Petitioner is entitled to have the question of whether there was a reduction in rank determined on appeal to the Civil Service Commission as authorized by Title 5 U.S.C. ¶ 863.

In the concurring opinion of Justice Frankfurter in the case of *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, at page 165, it was said:

> 'The construction placed by the court upon legislation conferring administrative powers shows consistent respect for the requirement of fair procedure before men are denied or deprived of their rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. See, e.g., *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *American Power Co. v. S.E.C.*, 329 U.S. 90, 107-108; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49.

At page 168 the Court said:

> 'This court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts.

> But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. See *Switchmen's Union v. National Mediation Board*, 320 U.S. 297; *Tubun v. United States*, 270 U.S. 568, 576, 577; *Pa. R. Co. v. Labor Board*, 261 U.S. 72.

Prior to February 1, 1961 as Master Shipfitter petitioner performed all the duties to the same extent that they are now performed by the Group Master (J.A. 164). Petitioner has been deprived of final authority over Shops 11/26 which he had prior to February 1, 1961, and such authority has been transferred to the Group Master (J.A. 161). There are 47 duties which petitioner no longer performs as set forth in J.A. 161-164. It is clear therefore that petitioner's responsibility since February 1, 1961 has been lessened, his authority has been diminished, his grade determinant functions have been transferred to the Group Master and he is now subordinate to the Group Master in the performance of his actual duties which have been curtailed and reduced (J.A. 165).

In *Dismuke v. United States*, 297 U.S. 167, 172, the Court said that "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer ... If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, ... or failing to follow a procedure which sets elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized. . . ."

II.

Reduction in Rank by Transfer of Duties, Functions and Responsibilities

The duties which were transferred from petitioner's supervision were as follows: (J.A. 161-164):

(d) The formulating and establishing overall shop policy for Shops 11/26 composed of over 1300 employees.

(e) The Administration of Shops 11/26.

(f) The operations of Shops 11/26.

(g) The organization of Shops 11/26.

(h) The facilities of Shops 11/26, $10,421,000 Buildings and Equipment, 260,000 square feet of usable area.

(i) Preparation and submission of Shop Budget; $1,500,000 yearly.

(j) Such other duties as the Group Master may assign (a catch-all).

(k) Supervision of Shops 11/26 employees (1300).

(l) Supervision of 13 different trades in 15 different ratings, performing diversified trade operations.

(m) Supervision of Shop 11/26 employees over a wide geographical work area, several buildings, many ships, on a three-shift-a-day basis.

(n) Supervision of experimental or non-standard work of Shops 11/26.

(o) Coordinating the efforts of Shops 11/26 in relation to inter and intra-shop relationships, and all other areas.

(p) Supervision of Shop Planning, Clerical and Personnel Sections of Shops 11/26.

(q) Policy meetings with the Production Officer and higher authority.

(r) Ordered to attend lower grade meetings with the Repair Superintendent, formerly my Foreman's assignment.

(s) Scheduling work operations of Shop 11/26.

(t) Formulating Shops 11/26 Safety policy.

(u) Determination of "fitness of employees" physical and trade qualifications for Shops 11/26.

(v) Determination of manpower needs for Shops 11/26, by trades and numbers.

(w) Determination of Supervisory needs of Shops 11/26 by trades and numbers.

(x) Selection of supervision for Shops 11/26 by trade and number.

(y) Assignment of supervision for Shops 11/26 by trade and area.

(z) Determination of training needs of Shops 11/26, types and amounts, by trade.

(aa) Performance of trade operations of all Shop 11/26 Supervision and artisans.

(bb) Settlement of trade jurisdictional disputes with labor union officials, or other Shop Masters, relating to Shops 11/26 employees.

(cc) Responsibility to determine the types and procedures of administrative controls to control and coordinate the production operations of Shops 11.26.

(dd) The determination of need, selection and assignment of Shop Planners in Shops 11/26.

(ee) The determination and establishment of Disciplinary Action Policy in Shops 11/26.

(ff) The determination of policy in personnel matters; types of leave, safety, training, fund drives, blood drives, bond drives, Beneficial suggestions, Incentive Awards, Conservation, etc., for Shops 11/26.

(gg) Determination of need, assignment and selection of administrative personnel for Shops 11/26.

(hh) Determination of need and types of administrative procedures to control Shops 11/26 operations.

(ii) Responsibility for Housekeeping and cleanliness of the building and working area of Shops 11/26.

(jj) Responsibility for shop indoctrination tours of military personnel newly assigned to the activity in relation to Shops 11/26.

(kk) Responsibility for award presentations to Shops 11/26 personnel (Safety, longevity, Beneficial Suggestion, Superior Performances, etc.) for both final review and presentation.

(ll) Responsibility to determine need for submission of and final review of overtime requests for Shops 11/26.

(mm) Assignment of areas, as to use, in building under control of Shops 11/26.

(nn) Resolution of material shortages affecting Shop 11/26 operations.

(oo) Responsibility for procurement, security, and maintenance of Shops 11/26 buildings and equipment.

(pp) Responsibility for timely and economical completion of Shops 11/26 work operations.

(qq) Responsibility for security clearance of personnel of Shops 11/26.

(rr) Responsibility as the highest and final technical authority for Shops 11/26.

(ss) Responsibility as the highest ungraded supervisory

position for Shops 11/26; there was not any other civilian position that had authority over Shops 11/26.

(tt) Responsibility for cost control of Shops 11/26 operations.

(uu) Responsibility for executive direction of Shops 11/26.

(vv) Responsibility for final authority in the developing and implementation of programs for Civil Defense—Natural Disaster, Mobilization, etc.

(ww) The rerouting of orders from higher authority direct to the Group Master was in accordance with the official recognition of petitioner's subordinate status, rank and authority. These orders were formerly routed directly to the former Master Shipfitter, when the Master Shipfitter possessed final authority.

(xx) Prior to February 1, 1961, as Master Shipfitter, with final authority over the grouping of shops then known as the Structural Shop 11/26, petitioner performed all duties to the same extent that such duties are now performed by the Group Master.

The foregoing transfer of duties clearly shows that petitioner was reduced in rank.

CONCLUSION

For the reasons shown above, it is respectfully submitted that this petition be granted.

WARREN E. MILLER
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Attorney for Petitioner

Appendix A

[Filed December 14, 1964]

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,371 Civil 3293-62

Francis J. Dugan,
Appellant,

v.

Fred Korth,
Secretary of the Navy, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Washington, Burger and McGowan, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel; and it appearing to the court that there is no error affecting substantial rights, it is

ORDERED and ADJUDGED by this court that judgment of the District Court appealed from in this case is hereby affirmed.

Per Curiam.

Dated: December 14, 1964

Appendix B

[Filed December 21, 1965]

September Term, 1965

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam

Senior Circuit Judge Washington did not participate in the foregoing order.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1134

FRANCIS J. DUGAN, PETITIONER

v.

PAUL HENRY NITZE, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

When in 1960 the Bureau of Ships announced a reorganization of the naval shipyards designed to reduce overhead costs by grouping shops within the production department of each shipyard (J.A. 181, 201, 321), petitioner was a Master Shipfitter at the Boston Naval Shipyard and the ranking civilian official in shops 11 and 26, reporting directly to the Production Officer (J.A. 3, 199). The reorganization created five major shop groups, each headed by a Group Master (a new position) (J.A. 181, 199). Shops 11 and 26 were brought together with shop 17 as the Structural Group, and the Master Sheetmetal Worker of shop 26 was selected to head the reorganized structural group as Group Master (J.A. 200,

214-520—66

201). Petitioner was informed that he was to continue as "head of Shops 11 and 26" but that he was to report directly and be responsible to the Group Master for all matters affecting the organization, facilities, and administration of the shipfitting and welding shops, as well as such additional matters as the Group Master might assign in connection with the over-all shop grouping plan (J.A. 200). As head of shops 11 and 26, petitioner continued to hold the rating of Master Shipfitter and to draw the same salary—$13,104 per annum—as he had before the reorganization (J.A. 182).

Petitioner complained to the Civil Service Commission that the Navy, in effecting the reorganization, had violated Section 14 of the Veterans Preference Act, 5 U.S.C. 863, by failing to give him (among other procedural benefits) 30-day written notice of, and a statement of reasons for, reducing his rank (J.A. 177–178). The Commission's Appeals Examiner held that the subordination of petitioner's position to a newly established supervisory position did not constitute a reduction in rank (J.A. 203–204), and hence the Act was inapplicable. The Board of Appeals and Review of the Civil Service Commission agreed that "the mere change in organization structure * * * did not reduce your rank as Master Shipfitter and ranking civilian supervisor in Shops 11 and 26" (J.A. 265–266), and, giving "careful consideration" to petitioner's contention that some of his former duties had been assigned to the Group Master, concluded:

> * * * So far as the record shows, your contention is valid only with respect to supervision of certain administrative and support services which were formerly maintained in each shop but which have since been consolidated for the shop group under supervision of the Group Master. In the opinion of the Board, supervision over such administrative and support services constituted a minor part of your duties and responsibilities and did not have any significant effect upon the rank of the position of Master Shipfitter. * * *.

Petitioner requested the Civil Service Commission to review his case (J.A. 270–318), but the Commission denied his request on the ground that he had "fail[ed] to demonstrate probable error in the previous decision of the Board of Appeals and Review" (J.A. 319). Petitioner then brought the present action in the United States District Court for the District of Columbia to set aside the reorganization and the Civil Service Commission's decision. The district court granted respondents' motion for summary judgment and dismissed the complaint (J.A. 198). Finding "no error affecting substantial rights," the court of appeals affirmed without opinion (Pet. App. 12). A timely petition for rehearing was denied on December 21, 1965 (Pet. App. 13).

This case presents no issue of general importance. In addition, the courts below were manifestly correct in ruling that petitioner's rights under Section 14 of the Veterans Preference Act were not denied. Concededly, the section is applicable only if petitioner's rank has been reduced. Since he retains the same title

and the same salary as before the reorganization—and the major portion of his former duties as well—clearly his rank has not been reduced.[1]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

[1] Since the Commission found that there was no reduction in rank largely on the basis of the basic facts alleged by petitioner, there was no occasion for it to hold an evidentiary hearing.

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TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

ARGUMENT 2

I. The decision of the lower court and this court in denial of petition for certiorari are contrary to prior decisions of this court and other courts requiring administrative agencies to comply with federal statutes and their own regulations and warrants reversal of the decision of the court below. 2

2. The specific regulations of the Navy Department which were not followed 7

TABLE OF CASES

Accardi v. Shaughnessy, 347 U.S. 260 . . . . . 3, 4

Elchibegoff v. United States, 106 Ct.Cl. 541 . . . . . 4, 5-7

Engelhardt v. United States, 125 Ct.Cl. 603 4

Feldman v. Herter, 276 F.2d 485, 107 U.S. App. D.C. 239 4

Gadsden v. United States, 78 F.Supp. 126, 111 Ct.Cl. 487 4

Kinter v. Toll, 276 F.2d 486 4

Lamb v. United States, Ct. Cl., 90 F.Supp. 369 4

O'Brien v. United States, 124 Ct.Cl. 655 4

Powell v. Brannan, 91 U.S. App. D.C. 16, 196 F.2d 871 4

Reynolds v. Lovett, 201 F.2d 181 5

Ritter v. Strauss, 261 F.2d 767, 104 U.S. App. D.C. 301 4

Service v. Dulles, 354 U.S. 363 . . . . . 2, 3, 4

Stringer v. United States, 90 F.Supp. 375 4

United States v. Perkins, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700 6

United States v. Wickersham, 201 U.S. 390, 26 S.Ct. 469, 50 L.Ed. 798 6

Washington v. United States, 147 F.Supp. 284 4

Watson v. United States, 355 U.S. 14 . . . . . 2, 3, 4

Wittner v. United States, 76 F.Supp. 110, 110 Ct.Cl. 231 . . . . . 4, 5

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PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner moves the Court for rehearing of the Order of this Court entered May 2, 1966 on the petition for a writ of certiorari and prays the Court upon such reconsideration to grant the petition for writ of certiorari heretofore filed herein.

OPINIONS BELOW

There were no opinions by the court below.

JURISDICTION

Petitioner seeks to review judgment of the United States Court of Appeals for the District of Columbia Cir-

cuit entered in this case on December 14, 1964 (R. 330). Motion for rehearing was denied by the Court on December 21, 1965 (R.337). The jurisdiction of this Court is invoked under 28 U.S.C. par. 1259(1), and Rule 58 of the rules of this court. Petition for certiorari was denied May 2, 1961

QUESTIONS PRESENTED

1. Whether the substantial grounds for the granting of certiorari as set forth in this Motion for Rehearing, which were not presented previously in the petition for writ of certiorari, warrant the granting by the Court of this Motion for Rehearing.

2. Whether the Navy Department is bound by a federal statute and its own regulations.

3. Whether petitioner, a United States Civil Service permanent, preference eligible employee, who had completed his probationary period, with Veterans' preference, was unlawfully reduced in rank when the provisions of Section 14 of the Veterans' Preference Act of 1944 (Title V U.S.C., par. 863) and prescribed Departmental regulations were not followed.

ARGUMENT

1. The decision of the lower court and this Court's denial of petition for certiorari are contrary to prior decisions of this Court and other courts requiring administrative agencies to comply with federal statutes and their own regulations, and warrants the reversal of the decision of the court below.

The Court has apparently overlooked its decisions in the cases of *Service v. Dulles*, 354 U.S. 363 and *Watson v. United States*, 355 U.S. 14, which cases were not mentioned in the petition for certiorari.

In *Service v. Dulles*, 354 U.S. 363, suit was instituted

by a foreign service officer to test the validity of his discharge by the Secretary of State under these circumstances: The State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk. Its findings had been approved by the Deputy Undersecretary whose approval of findings favorable to an employee were final under the applicable regulations. No findings unfavorable to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Undersecretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission on its motion conducted its own hearing and found that there was reasonable doubt as to petitioner's loyalty and advised the Secretary that petitioner should be dropped and removed from the rolls of the Department of State, acting solely on the basis of the finding of that Board and without making any independent determination of its own on the record in the case and promptly discharged petitioner, basing his action on Executive Orders 9835 and 10241 and paragraph 103 of Public Law 188, 82nd Congress, which authorized the Secretary to "terminate the employment of any officer * * * in the foreign service whenever he shall deem such termination necessary or advisable in the interest of the United States." The Court held petitioner's discharge was invalid because it violated the Regulations of the Department of State and judgment was reversed.

The Court granted certiorari in *Watson v. United States*, 335 U.S. 14, where judgment was vacated and the case remanded for reconsideration in the light of the opinion in *Service v. Dulles, infra.*

The decision in the case of *Service v. Dulles* followed its decision in *Accardi v. Shaughnessy*, 347 U.S. 260 which holds that regulations validly prescribed by the Government are binding upon the Government as well as the citizen, even where the administrative action under review was discretionary in nature.

This Court determined in *Service v. Dulles*, *Watson v. United States*, and *Accardi v. Shaughnessy* that Departmental regulations establishing rights for employees must be complied with. Neither these cases nor the following cases were called to the Court's attention in the petition for certiorari filed herein:

In *Stringer v. United States*, 90 F. Supp. 375, at page 379, referring to non-compliance with Section 14 of the Veterans' Preference Act, the United States Court of Claims said:

> "The requirements of Section 14 are specific and mandatory. Neither this court nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required. *Lamb v. United States*, Ct. Cl., 90 F.Supp. 369; *Gadsden v. United States*, 78 F.Supp. 126, 11 Ct. Cl. 487; *Wittner v. United States*, 76 F.Supp. 110, 110 Ct. Cl. 231; *Elchibegoff v. United States*, 106 Ct. Cl. 541."

Petitioner contends that certain procedural rights given him by the Veterans' Preference Act were denied. As was said by the United States Court of Claims in *Washington v. United States*, 147 F.Supp. 284, at page 286:

> "In this situation we are not authorized to consider the merits of plaintiff's case but merely whether or not his procedural rights have been violated. *Engelhardt v. United States*, 125 Ct. Cl. 603; *O'Brien v. United States*, 124 Ct.Cl. 655. * * *"

The courts on different occasions have decided that the acts of agencies and the Civil Service Commission "violative of the law and applicable regulations" may be reviewed. *Ritter v. Strauss*, 261 F.2d 767, 104 U.S. App. D.C. 301. *Feldman v. Herter*, 276 F.2d 485, 107 U.S. App. D.C. 239. *Kinter v. Toll*, 276 F.2d 486. *Powell v. Brannan*, 91 U.S. App. D.C. 16, 196 F.2d 871.

It was said in *Lamb v. United States*, 90 Fed. Supp. 369 at 374:

> "The Act and the Regulations require, among other things, that a preference eligible must be given a thirty-day notice of proposed action to discharge, which notice must set forth any and all reasons in detail for such proposed action; that the employee shall be given a reasonable time within which to answer personally and in writing the charges and notification of proposed adverse action. Next the employee is entitled to receive a notice of adverse decision based on the matters referred to in the prior notice and on any answer thereto made by the employee. * * *"

The United States Court of Appeals for the District of Columbia Circuit, in the case of *Reynolds v. Lovett,* 201 F.2d 181, ruled that in the reduction of personnel, Section 12 of the Veterans' Preference Act, 5 U.S.C.A. 861, must be followed.[1]

The provisions of Section 14 of the Veterans' Preference Act, 5 U.S.C.A., paragraph 863, were held, by the United States Court of Appeals for the District of Columbia Circuit, to be mandatory in *Wittner v. United States,* 76 Fed. Supp. 110.

Petitioner's reduction in rank was accomplished without compliance with Section 14 of the Veterans' Preference Act. No reasons were given therefor in writing. He was not given thirty days' advance written notice of the proposed action nor did he receive a statement of "any and all reasons, specifically and in detail" for his reduction in rank and was deprived of his right to appeal to the United States Civil Service Commission from the adverse decision of the administrative officer who reduced him in rank. Although he tried to appeal, his appeal was arbitrarily refused (J.A. 120).

The United States Court of Claims, in the case of *Elchibegoff v. United States,* 106 Court of Claims 541, held these provisions of law in respect to charges against

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[1] See concurring opinion of Circuit Judge Clark at 201 F.2d 182.

Civil Service employees were mandatory and the procedure established by the Veterans' Preference Act must be followed to satisfy law. In order to effect a legal dismissal, the Court said:

> "If the procedure provisions are not mandatory they are largely meaningless. The officials could act as if such provisions were never put into the law. They could apply or not apply them to suit their whim, just as they do, or do not, take their morning calisthenics depending on whether they feel like it. We cannot believe Congress had any such idea in mind.
>
> "In similar cases this Court has heretofore invoked the same line of reasoning. *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700; and *United States v. Wickersham*, 201 U.S. 390, 26 S.Ct. 469, 50 L.Ed. 798.
>
> "In the *Wickersham* case, *supra*, the court, on page 399 of 201 U.S., page 472 of 26 S. Ct., uses the following language:
>
> '* * *We see no reason * * *for withholding * * * the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employee in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority. * * *
>
> "The Veterans' Preference Act provides in effect that no veteran eligible, employed in any department or agency of the government, shall be discharged, 'except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person * * * shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; * * *' and ' shall be allowed a reasonable time for answering the same personally and in writing.'
>
> "The language is clear. It does not prevent a

discharge, if the procedure is followed, but it does forbid a discharge unless it is followed."

The same Veterans' Preference Act, referred to above, is involved in the instant case, where the following wording is involved:

"Section 14 of the Veterans' Preference Act of 1944 (Title 5, U.S.C., par. 863), provides:

'No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or *reduction in rank* or compensation is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right of appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision * * *." (emphasis supplied)

2. The specific regulations of the Navy Department which were not followed.

The guide lines for determining whether a reassignment constitutes a reduction in rank is found in Naval Civilian Personnel Instruction 352 4-4 (J.A. 123) which reads as follows:

A. General

"When the reassignment of a veteran preference employee is proposed, the activity must determine whether the reassignment will constitute a 'reduction in rank' within the purview of Section 14 of the Veterans' Preference Act of 1944. If so, it must be treated as an adverse action and the procedures in NCPI 352.5-6 must be followed.

b. Guidelines for determining whether a reassignment constitutes a reduction in rank.

"Neither the Veterans' Preference Act nor the Civil Service Commission's regulations specify the circumstances in which a reassignment (which involves no reduction in compensation) is a reduction in rank. Commission decisions, however, indicate that the following comparisons, between these positions from and to which reassignment is proposed, are necessary:

"(1) Organization level, particularly when supervisory positions are involved.
"(2) Levels of supervisions to which the positions report.
"(3) Promotional opportunities."

When those guidelines (1) organization level, (2) levels of supervision and (3) promotional opportunities are applied to the instant case, it is clear that there has been a reduction in petitioner's rank (J.A. 123).

The Naval Personnel Instructions (hereinafter referred to as NCPI) and specifically NCPI 351 (J.A. 17) require that all reassignments including those caused by reorganizations must be effected under the Reduction-in-Force Procedure. NCPI 351.2-5q provides:

"Reduction in Force

"2-5. Definitions

"*q. Reassignment.*

"Any position change of an employee from one position to another within the Naval Establishment whether the movement is upward (promotion), downward (change to lower grade), or lateral

(movement without promotion or change to lower grade)."

* * *

"NCPI 351—Reduction in Force

"2-3. Use of Reduction-in-Force Procedure

"Following is an explanation of what does and does not constitute a reduction-in-force action.

"a. When one or more employees are to be released from a competitive level, by separation, furlough for more than 30 days, or reassignment involving displacement, or change to lower grade, because of lack of work, shortage of funds, reorganization, or to make positions available to persons exercising restoration or reemployment rights, all resultant actions are reduction-in-force actions and must be effected in accordance with this instruction.

"b. The criteria in NCPI 352 will be used to determine whether the change to lower grade of an employee is a reduction-in-force action."

Although it was mandatory that the Boston Naval Shipyard effect the reassignments to Group Master and Head of Shop positions in accordance with the Reduction-in-Force Procedures, such procedures were not followed here.

Since petitioner, as Master Shipfitter and F. J. Simon, as Master Sheetmetalworker, were both eligible and qualified for reassignment to the Group Master position (J.A. 134-135) (J.A. 19-20, par. 23-26), it is seen that the former positions of both the plaintiff F. J. Dugan and F. J. Simon were interchangeable with the position of Group Master under the criteria of NCPI 351.42(b). (J. A. 18, para. 22) which provides:

"NCPI 351—Reduction in Force

"4-2. Competitive Levels.

"*b. Determining interchangeability between positions.*

"By interchangeability is meant such similarity between official duties of the positions that incumbents can be changed from one to the other without an unreasonable period of training or adjustment. Positions are interchangeable if it is found that the same knowledge, technique and know-how are required in performing the official duties, taking into consideration laws, orders, rules, regulations, policies, procedures, or skills that must be applied."

It was mandatory that the Boston Naval Shipyard establish a "competitive level" as defined in NCPI 351.2-5e (J.A. 18) to group the positions of Master Shipfitter and Master Sheetmetal worker for initial reduction-in-force competition to determine which employee would be separated from, and which would be retained in, their respective positions.

NCPI 351.2-5(e) provides:

"NCPI 351— Reductions in Force

"2-5. Definitions

"*e. Competitive level.*

"The grouping of positions for initial reduction-in-force competition to determine which employees will be separated from, and which will be retained in, their positions. All positions, within a competitive area, of such similarity that interchange of personnel is feasible are placed in the same competitive level. See NCPI 351.4-2."

After the establishment of a "competitive level," as required by NCPI 351.2-5e (J.A. 18) the Boston Naval Shipyard did not comply with the criteria of NCPI 351.2-3 (J.A. 20-21) and NCPI 351.4-3b(1), Group I, and NCPI 351.4-3b(1), Group I (c)(d) J.A. 21-22, para. 26) to determine which employee had the greater retention preference rights. Petitioner, a war veteran, is, in accordance with this criteria, in Retention Sub-Group I A and F. J. Simon, a non-veteran, is in Retention Sub-Group I B (J.A. 27). Therefore, petitioner in Retention Sub-

Group I A possessed greater seniority or retention rights than F. J. Simon possessed in the lower seniority or retention group I B. Petitioner with the greater seniority or retention preference rights when "reached for action" would have been reassigned to the position of Group Master (J.A. 27) if the Navy's regulations were followed.

It is clear by the criteria of NCPI 351.6-3(1)(2)(3) and NCPI 351.9-7 (J.A. 22-23, para. 27) that the respondent did not have the authority, within the criteria of the Naval Civilian Personnel Instructions, to make any exception to the regular order of selection (J.A. 23, para. 28). Therefore under the Reduction-in-Force Procedures, or Retention Preference Regulations, cited above, respondent did not have the authority to effect the reassignment of F. J. Simon to the Group Master position; and it was at the same time mandatory that the Boston Naval Shipyard effect the reassignment of the petitioner to the Group Master position on 1 Feb. 1961.

Further, the respondent did not comply with the provisions of NCPI 310.2-2 (J.A. 25) in effecting the reassignments to Group Master and Head of Shop on 1 Feb. 1961. That regulation provides:

> "NCPI 310—Appointments and other Accessions
>
> "2-2. Positions Must Be Established
>
> "Before an accession may be made in the Federal service, there must be an established position for the employee to occupy."

There was no Offficial Job Position Description Sheet for either the Group Master or Head of Shops positions in existence in the shipyard to define the official duties of these positions on 1 Feb. 1961. Therefore there was no authority to effect reassignments to either of these positions on 1 Feb. 1961. The position of Group Master has been subsequently established (J.A. 25, para. 32) but the position of Head of Shop was not properly established (J.A. 143, par. 11).

Further, the Boston Naval Shipyard did not comply with the criteria of NCPI 352 4-2 (J.A. 26-28, par. 32-34) in effecting the reassignment of petitioner F. J. Dugan as Head of Shops on 1 Feb. 1961.

> "NCPI 352—Separations (Nondisciplinary), Furloughs and Changes to Lower Grade
>
> "4-2. Change to Lower Grade
>
> "*c. Applicability of Retention Preference Regulations to change to lower grade.*
>
> "Reduction in force procedures (NCPI 351) will be used to select employees to be changed to lower grade when such changes are caused by:
> (1) lack of work
> (2) lack of funds
> (3) reorganization
> (4) exercise of regulatory reassignment or reemployment rights.
>
> "As used in (3) above, 'reorganization' means the planned eliminations, additions, or redistribution of functions and duties within an organization. Thus, the reduction-in-force system will govern any adverse action brought about by deliberate management action to change official duties previously assigned, where the reasons are impersonal to the affected employee. This applies to unpublicized positions under his control, as well as to changes resulting from formal reorganization orders affecting complete organizations."

Petitioner was entitled to the protection of NCPI 351.9-3 (J.A. 23, para. 28-29) and NCPI 351.10-5a(6)b (J.A. 24, par. 29-30) and requests the Court to provide such relief as is stated on J.A. 139, paragraph 9, by ordering that the respondent comply with the criteria of Naval Civilian Personnel Instructions that were in full effect on 1 Feb. 1961 (J.A. 38-40, para. 56 1/2 - 57) when the reassignments of F. J. Simon and petitioner were placed in effect.

The decision of the Court below which has the effect of holding Government Departments need not follow statutes and regulations promulgated by such Departments

may have a far-reaching impact upon the rights of government employees who are reassigned in the closing of bases and consolidations and reorganizations of government offices throughout the country. The law as construed in the instant case establishes a precedent which can thwart the intention of Congress with respect to protecting Government employees from having their rights as given by statute and regulation impaired or abolished. Therefore, this Court in the exercise of its prerogative, should take jurisdiction here and correct the decision of the lower court.

The foregoing constitutes substantial grounds for granting this petition for certiorari which were not presented in such petition. Such omission warrants the granting of this motion for reconsideration.

Respectfully submitted,

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I certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of this Court.

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